Supreme Court, U.S.
FILED
JUL 6 1995
CLERK

(3)

No. 94-1880

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HOMESTEAD INSURANCE COMPANY,
Petitioner,

v.

DONALD ZOPPO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY BRIEF FOR PETITIONER

ALAN M. PETROV
(Counsel of Record)
TIMOTHY J. FITZGERALD
THOMAS D. ROBENALT
GALLAGHER, SHARP, FULTON & NORMAN
7th Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310
Attorneys for Petitioner Homestead Insurance Company

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RULES INVOLVED

Rule XXII of the Rules of Practice of the Supreme Court of Ohio, effective June 1, 1994, provides as follows:

> The Rules of Practice of the Supreme Court of Ohio, adopted by the Supreme Court on January 11, 1994, shall take effect on June 1, 1994. These rules supersede the Rules of Practice of the Supreme Court of Ohio, effective August 16, 1971, as amended through July 16, 1990. These rules govern all proceedings and actions brought after the effective date and also all further proceedings and actions then pending, except to the extent that their application in a particular action pending when the rules take effect would not be feasible or would work an injustice, in which event the former procedure applies.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

PETITIONER LACKED STANDING TO PURSUE A CROSS-APPEAL IN THE SUPREME COURT OF OHIO BECAUSE PETITIONER WAS NOT AN "AGGRIEVED PARTY" FROM THE JUDGMENT OF THE COURT OF APPEALS AND BECAUSE THE ASSIGNMENTS OF ERROR IN QUESTION HAD NOT BEEN DECIDED BY THE COURT OF APPEALS.

Respondents argue that there was no due process violation in this case because petitioner did not file a notice of cross-appeal in the Supreme Court of Ohio pursuant to Rule II, Section 2(A) of the Rules of Practice of the Supreme Court of Ohio. *See*, Brief Opposing Petition for

Writ of Certiorari, at p. 4. Respondents' argument of waiver is wrong for a number of reasons.

First, the rule relied upon by respondent was not even in effect when this matter was appealed to the Supreme Court of Ohio. Respondents' notice of appeal to the Supreme Court of Ohio was filed on July 26, 1993. Rule II, Section 2(A) of the Rules of Practice of the Supreme Court of Ohio did not become effective until June 1, 1994. *See*, Rule XXII of the Rules of Practice of the Supreme Court of Ohio. At the time when respondents' notice of appeal was filed in July 1993, procedurally this case was governed by the Rules of Practice of the Supreme Court of Ohio, effective August 16, 1971, as amended through July 16, 1990. Under those rules, there was no specific rule governing the filing of a "cross-appeal" in the Supreme Court of Ohio.[1]

Second, even ignoring the absence of a procedural rule specifically allowing for the filing of a cross-appeal, petitioner lacked the legal standing to pursue an appeal from the judgment of the Court of Appeals in this case. As a prerequisite to the right to institute and prosecute an

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[1] Petitioner does not mean to suggest that multiple parties could never appeal a case to the Supreme Court of Ohio prior to June 1, 1994. Multiple appeals could be filed under certain circumstances. Rule I, Section 1(A)(d) of the Rules of Practice of the Supreme Court of Ohio, in effect when this case was appealed to the Supreme Court of Ohio, provided that "[i]f a timely notice of appeal is filed in the Court of Appeals by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed." As pointed out herein, however, case law from the Supreme Court of Ohio makes clear that only parties injured or aggrieved by a court of appeals judgment have standing to appeal to the Supreme Court and only as respects assignments of error that had actually been decided adversely to that party's interests by the court of appeals. Petitioner was not an aggrieved party as respects the Court of Appeals' opinion in this case and, therefore, had no right or standing to file an appeal to the Supreme Court of Ohio. An appeal by petitioner was also not available because the "moot" assignments of error were not decided by the Court of Appeals.

appeal in the state of Ohio, the party desiring to appeal from a lower court's judgment must have been injuriously affected by that judgment. *See, Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 591 N.E.2d 1203, 1205 (1992) (citing *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 23 O.O. 369, 42 N.E2d 758 (1942)) *See also, Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 439, 605 N.E.2d 13, 14 (1992). This rule of appellate practice has been long recognized in both state and federal jurisdictions. *See*, 4 Am.Jur.2d, *Appeal and Error*, §§ 182-185.

In the case of *Ohio Contract Carriers, supra*, the Supreme Court of Ohio set forth the controlling law in this area when it dismissed an appeal, which had been properly filed by an interested party in accordance with the Court's procedural rules, because the appellant was not "an *aggrieved* party whose *substantial* right has been affected by the questioned order." *Ohio Contract Carriers, supra*, 140 Ohio St. at 163, 23 O.O. at 370, 42 N.E.2d at 759 (emphasis in original). The pertinent rule of law announced by the Supreme Court of Ohio henceforth governing cases such as the one at bar was stated in the court's syllabus as follows:

> Appeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant.

See also, In re Guardianship of Love, 19 Ohio St.2d 111, 113, 48 O.O.2d 107, 109, 249 N.E.2d 794, 795 (1969).

The same principle of law applies to a party's ability to initiate and prosecute cross-appeals in Ohio's intermediate courts of appeals. *See Seringetti Constr. Co. v. Cincinnati*, 51 Ohio App.3d 1, 553 N.E.2d 1371 (1988) (a party in a civil action has no standing to pursue a cross-appeal from the entry of a final judgment which has been entered by a lower court in that party's favor).

There is no question here that, on all aspects of the respondents' claims for bad faith and punitive damages, petitioner had prevailed in the Court of Appeals. By definition, the only "aggrieved" parties from the Court of Appeals' judgment in this case with the legal standing to pursue any type of appeal to the Supreme Court of Ohio concerning these claims were the respondents. The Court of Appeals' decision held that petitioner was entitled to final judgment in its favor as a matter of law on respondents' bad faith and punitive damage claims. (App., pp. 19a-25a) Since it had prevailed in the Court of Appeals, petitioner was not "aggrieved" by this judgment. Petitioner did not suffer any present injury or prejudice when the Court of Appeals declared six of petitioner's remaining assignments of error "moot." Under existing Ohio law, when the Court of Appeals' decision was announced, those assignments of error were "moot." *See,* Rule 12(A)(1)(c), Ohio Rules of Appellate Procedure. When the Supreme Court of Ohio reversed the Court of Appeals, those six assignments of error were no longer moot.[2]

There was absolutely no aspect of the Court of Appeals' decision on the bad faith and punitive damage claims that was in any way adverse or injurious to the interests

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[2] Respondents concede that at least two of petitioner's six assignments of error were never addressed by the Supreme Court of Ohio. *See,* Brief Opposing Petition for Writ of Certiorari, at pp. 8-9. Respondents' suggestion that the Supreme Court of Ohio did "consider and rule" on the merits of the four other assignments of error is sophistry. *See,* Brief Opposing Petition for Writ of Certiorari, at pp. 4-5. Had the Supreme Court of Ohio in fact passed upon the merits of those four assignments of error, obviating the need to remand this case to the Court of Appeals for a determination only as to those assignments of error, the Court would have said so. And, even if it is assumed for purposes of argument that respondents are correct in their position that the Supreme Court of Ohio impliedly addressed some of the "moot" assignments of error, a remand is still necessary for consideration of the two admittedly unresolved assignments of error.

of petitioner. Not only was there no practical reason for petitioner to file a cross-appeal, but since petitioner was not, by definition, an "aggrieved party," it had no legal standing to file and pursue a cross-appeal to the Supreme Court of Ohio. *See, Ohio Contract Carriers, supra; Seringetti Constr. Co., supra.*

Requiring petitioner to prosecute a cross-appeal without the benefit of a definitive ruling by the Court of Appeals on those six assignments of error would have required petitioner to guess and speculate as to what arguments needed to be raised in the Supreme Court of Ohio in order to have any hope of prevailing on such a cross-appeal. The Supreme Court of Ohio has acknowledged that requiring a party to do so is fundamentally unfair, not only for the litigants but for the Court as well. *See, Lumbermen's Alliance v. American Excelsior Corp.*, 33 Ohio St. 2d 37, 39-40, 62 O.O.2d 373, 374, 294 N.E.2d 224, 226 (1973):

> Appellant thus found himself in a position of having to prepare an appeal to this court without ever having been given any reason or reasons for the ruling concerning his motions for discovery, other than that the assignment of error was "without merit." Having been given no reason, appellant had to speculate as to what obstacles, legal or otherwise, need be overcome in his appeal to this court. It is a purpose of App.R. 12(A) to avoid a need for such speculation on the part of *all* parties concerned, this court included.

Furthermore, even if petitioner had filed a cross-appeal, as respondents suggest could have been done, the Supreme Court of Ohio would not have reviewed any assignments of error which had not been decided by the Court of Appeals. *See, Winslow v. Ohio Bus Line Co.*, 148 Ohio St. 101, 35 O.O. 91, 73 N.E.2d 504 (1947), syllabus paragraph five. Consequently, a cross-appeal would have been futile as it would have been dismissed. *See, Squire v.*

The Guardian Trust Co., 144 Ohio St. 266, 29 O.O. 423, 58 N.E.2d 651 (1944), syllabus paragraph two; *Ohio Contract Carriers, supra.*

The rule of practice relied upon by respondents did not even exist at the time this case was presented to the Supreme Court of Ohio. The petitioner was not an "aggrieved party" and, therefore, could not have appealed the judgment of the Court of Appeals. The assignments of error in question were not decided by the Court of Appeals and, therefore, could not have been reviewed in the Supreme Court of Ohio. Petitioner was not required to file a cross-appeal to the Supreme Court of Ohio. To the contrary, Ohio law precluded petitioner from doing so.

Petitioner's due process right to a full and meaningful review of all assignments of error properly raised in its appeal cannot be debated. Due process protections of the federal constitution guaranteed petitioner meaningful review. The denial by the Supreme Court of Ohio of any review of certain assignments of error violated the Due Process Clause of the fourteenth amendment to the United States Constitution. *See, Honda Motor Co., Ltd. v. Oberg*, 512 U.S. ——, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 523 N.E.2d 851 (1988); *Moldovan v. Cuyahoga Cty. Welfare Dept.*, 25 Ohio St.3d 293, 496 N.E.2d 466 (1986). The petitioner's assignments of error were not meaningless. The Supreme Court of Ohio deprived petitioner of the constitutionally protected right to have each of its assignments of error, which were appropriately preserved, decided on the merits. The egregious disregard for petitioner's due process rights exhibited by the Supreme Court of Ohio can be remedied only by this Court issuing a writ of certiorari. That writ should be issued!

CONCLUSION

Wherefore, this Supreme Court of the United States should grant the petition of Homestead Insurance Co. and cause a writ of certiorari to be issued in this case to the Supreme Court of Ohio.

Respectfully submitted,

ALAN M. PETROV
(Counsel of Record)
TIMOTHY J. FITZGERALD
THOMAS D. ROBENALT
GALLAGHER, SHARP, FULTON & NORMAN
7th Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310
Attorneys for Petitioner Homestead Insurance Company